



November 9, 1999

Ms. Margaret A. Roll
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR99-3212

Dear Ms. Roll:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 128731.

The Texas Department of Human Services ("DHS") received a request for information relating to complaints filed with DHS's Civil Rights Department in April and May 1999. You seek to withhold portions of the requested information under sections 552.101 and 552.103 of the Government Code.

Section 552.101 protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information coming within the common-law right to privacy. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. You claim common-law privacy protection for information in a responsive complaint file dealing with allegations of sexual harassment.

In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation. *Id.*

The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment was exactly the kind of information specifically excluded from

disclosure under the privacy doctrine as described in *Industrial Foundation*. *Id.* at 525. However, the court ordered the release of the affidavit of the person under investigation, in part because it ruled that he had waived any privacy interest he may have had in the information by publishing a detailed letter explaining his actions and state of mind at the time of his forced resignation. *Id.* The *Ellen* court also ordered the disclosure of the summary of the investigation with the identities of the victims and witnesses deleted from the documents, noting that the public interest in the matter was sufficiently served by disclosure of such documents and that in that particular instance “the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements.” *Id.* at 525.

In this instance, we have marked information in the complaint file which we believe can serve as a summary of the investigation. In order to comport with the *Ellen* decision you should release this summary with the identities of victims and witnesses redacted. We also believe that, in this instance, the rest of the information in this complaint file should be withheld under *Ellen*.

You claim that the other responsive complaint files are protected by section 552.103 because of anticipated litigation to which DHS will be a party. Section 552.103(a) excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

You advise that the remaining responsive complaint files are related to pending complaints with the Equal Employment Opportunity Commission (the “EEOC”) or the Texas Commission on Human Rights (the “TCHR”). The TCHR operates as a federal deferral

agency under section 706(c) of title VII, 42 U.S.C. § 20003-5. The EEOC defers jurisdiction to the TCHR over complaints alleging employment discrimination. *Id.* This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 (1983), 336 (1982). By showing that a complaint filed with the EEOC or TCHR is pending, you have shown that litigation is reasonably anticipated. Our review of the documents at issue shows that they are related to the subject of the anticipated litigation. Thus, DHS has met both prongs of section 552.103(a). Accordingly, you may generally withhold under section 552.103(a) the materials for which you claim the protection of that provision.

Please note, however, absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). To the extent the opposing parties in the pending litigation have seen or had access to these records -- e.g. the EEOC complaint forms themselves -- there would be no justification for now withholding such information from the requestor pursuant to section 552.103(a). Please note, too, that section 552.103(a) does not authorize withholding materials which have already been made available to the public. Open Records Decision No. 436 (1986). The applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely



William Walker
Assistant Attorney General
Open Records Division

WMW/ljp

Ref: ID# 128731

Encl. Submitted documents

cc: Ms. Charlene Galyon
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(w/o enclosures)